APPENDIX "A"

Motion for Remand.

In the United States Court of Appeals, for the Fifth Circuit.

George Levine, Appellant, v. United States of America, Appellee. No. 19974.

The appellant was convicted on July 19, 1962 in the Southern District of Florida on charges of conspiracy and violations of the anti-fraud provisions of the Securities Act of 1933 and the mail fraud statute. He was sentenced to fifteen months in prison on each of ten counts, a total of twelve and a half years. His conviction was affirmed by this Court on March 11, 1965 (342 F. 2d 147). After a petition for a writ of certiorari was filed in the Supreme Court of the United States by this appellant and three others, the Government conceded that there was no evidence to show that appellant Levine was involved in the conspiracy prior to July 1960, and that his conviction of seven substantive offenses prior to that time could not stand. The Supreme Court, on February 28, 1966, remanded the case to this Court with instructions to reverse the convictions the Government conceded must be reversed, and to determine, in the light of our conclusions, the evidence, instructions and applicable principles of law, whether further relief should be granted.

Subsequently, in accordance with the policy set forth in the Government's Supplemental Memorandum to the Supreme Court in *Schipani v. United States*, No. 304,

O. T. 1966), a review of the present prosecution was undertaken. It appears from this review that, pursuant to the Departmental authorization described at pages 2-3 of the Supplemental Memorandum for the United States in *Black v. United States*, 385 U.S. 26, No. 1029, O. T. 1965, the FBI installed a microphone by trespass in a commercial establishment which was owned by an acquaintance of appellant Levine and in which Levine may have had a proprietary interest. This surveillance covered the period May 11, 1962 to May 7, 1963. Logs made as a result of the surveillance are available.

Appellant Levine was under indictment in this case and the trial of said indictment took place during this period of surveillance. Conversations of petitioner Levine relating to the charges and with counsel in the case at bar were overheard. It appears that none of the material in the logs was communicated in any manner to the Securities and Exchange Commission, the Post Office Department, [illegible] and the prosecutors who tried the [illegible]

In view of the subject matter and content of the overheard conversations, and because the [illegible] [illegible] of the case in this proceeding by the

Supreme Court in *Black v. United States*, 385 U.S. 26. The Government, therefore, suggests that this Court enter an order vacating the judgment and remanding the cause to the District Court for a new trial.

Should the Government seek to prosecute the Appellant anew we will make available under an appropriate protective order copies of the logs in question to aid appellant in preparing for a new trial.*

Respectfully submitted,

Fred M. Vinson, Jr.
Assistant Attorney General
Criminal Division

March 31, 1967.

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*There are presently before the Court (petitions) Nassau Gradsky, Robert Grane and Robert B. Roberts. These electronic surveillance of these defendants and the of their conversations. These we believe entitled to any relief predicated upon rights. However, copies of the motion to these defendants, informing them of this action and to take such action as they deem in the appellate process.

APPENDIX "B."

Motion of Appellant Robert B. Roberts to Remand to the United States District Court for a New Trial or, in the Alternative, for Further Hearing in the United States District Court.

In the United States Court of Appeals, for the Fifth Circuit.

Norman Gradsky, George Levine, Howard W. Meadors, Gertrude Hogue, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glaser and E. E. Gibbons, Appellants, vs. United States of America, Appellee. No. 19974.

The appellant Robert B. Roberts was convicted on July 19, 1962 in the Southern District of Florida on charges of conspiracy and violations of the anti-fraud provisions of the Securities Act of 1933 and the mail fraud statute. He was sentenced to one year in prison on each of ten counts to run consecutively, a total of ten years. His conviction was affirmed by this Court on March 11, 1965 (342 F. 2d 147) as to Counts Three, Six, Eight and Ten and the Judgment was vacated as to the remaining Counts. A Petition for Writ of Certiorari was filed in the Supreme Court of the United States by appellants Robert B. Roberts, George Levine, Robert Grene and Norman Gradsky. The Supreme Court on February 22, 1966 remanded the case to this Court with instructions to reverse the convictions [illegible] Government conceded must be reversed as to [illegible] and to reconsider in the light of the [illegible] concession, the evidence, instructions and [illegible] of the [illegible] further relief [illegible] and [illegible] this Court, on [illegible] on January 16, 1967, [illegible]

The Government has now filed a Motion for Remand to the District Court for a new trial as to appellant Levine in that the FBI improperly monitored conversations between Levine and his attorney, during the period of the trial of the within matter, relating to the charges against Levine. *Black v. United States*, 385 U.S. 26, 17 L. Ed. 2d 26.

Appellant Robert B. Roberts recognizes that this error as to appellant Levine does not necessarily require that his conviction be set aside. To secure a new trial he must show that the denial of Levine's constitutional rights prejudiced him in some manner, for where error as to one defendant in a conspiracy case requires that a new trial be granted as to him the rights of his co-defendants to a new trial depend whether that error prejudiced them. *Glasser v. United States*, 86 L. Ed. 680, 702, 315 U.S. 60. In discussing the same problem as to the appellants' standing to raise such an issue, the United States Supreme Court in *Hoffa v. United States*, 17 L. Ed. 2d 374, at page 381, stated: "It is clear on the other hand that Partin's reports to Agent Sheridan uncovered leads that made possible the development of evidence against petitioners Parks and Campbell." See, also, *Coplin v. United States*, 191 F. 2d 749, 756; *Nardoni v. United States*, 308 U.S. 338, 60 S.C. 266, 84 L. Ed. 307.

During the lengthy trial counsel for appellant Roberts had numerous conferences and conversations with appellant Levine and with his attorney as well as with all other defense counsel, relating to all phases of the trial, including trial strategy, the manner of cross-examination of witnesses, which defense attorney was to conduct the cross-examination of certain witnesses

and the advisability of and reasons for not calling any defendant as a witness. If any part of appellant Levine's conversations, monitored by the FBI, made reference to any of the foregoing matters, appellant Roberts' rights to effective assistance of counsel were equally as prejudiced and violated as those of appellant Levine. Further, if any part of these conversations uncovered leads that made possible the development of evidence against appellant Roberts, he is entitled to a new trial. *Hoffa v. United States, supra.*

If this Court deems that Roberts is not entitled to a new trial as a matter of law, appellant Roberts respectfully requests that this matter be remanded to the District Court for an evidentiary hearing as to the question of whether any of the conversations monitored might refer to appellant Robert's counsel or any statements attributed to such counsel, as well as to ascertain if any of the intercepted material was in any way indirectly communicated to any other person representing or in any way connected with the Securities and Exchange Commission or the prosecutor who tried this matter and to further ascertain if any part of those conversations uncovered leads that made possible the development of evidence against appellant Roberts.

Respectfully submitted,

Thomas F. Call
Attorney for Appellant Robert B. Roberts
523 West Sixth Street, Suite 737
Los Angeles, California 90014
Telephone: 627-8104

Dated: April 6, 1967

APPENDIX "C."

United States Court of Appeals, Fifth Circuit.

Norman Gradsky, George Levine, Howard W. Meadors, Gertrude Hogue, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glaser and E. E. Gibbons, Appellants, vs. United States of America, Appellee. 19974.

Filed: May 3, 1967.

Appeal from the United States District Court for the Southern District of Florida.

Before Coleman, Dyer (Circuit Judges, Estes 1967), District Judge.

By the Court:

The motion of appellant, Robert B. Roberts, to remand this cause as to him to the United States District Court for a new trial is denied, without prejudice to such application by him to the District Court as may be appropriate.

APPENDIX "D."

Motion to Reconsider Motion of Appellant Robert B. Roberts to Remand to the United States District Court for a New Trial.

Appellant Robert B. Roberts.

In the United States Court of Appeals, for the Fifth Circuit.

Norman Gradsky, George Levine, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glaser and E. E. Gibbons, Appellants, vs. United States of America, Appellee. No. 19974.

On April 11, 1967, Appellant Robert B. Roberts filed a Motion to Remand to the United States District Court for a New Trial, which was denied by this Court on May 3, 1967, without prejudice to such application by Roberts to the District Court as may be appropriate.

On March 20, 1967, the United States Supreme Court granted a Writ of Certiorari in *O'Brien, et al. v. United States*, 87 S. Ct. 1158, which would appear to be controlling in this case and require a remand to the District Court for a new trial. In the *O'Brien* case the Solicitor General conceded that a wiretap had been used to overhear certain conversations of Petitioner O'Brien, but stated that the logs of the monitoring agents were not communicated in any manner outside the FBI. Co-petitioner, Thomas Parisi, was not involved in any way in the wiretap, but nevertheless was granted a new trial in the District Court together with Petitioner

O'Brien. Appellant Roberts stands at precisely the same position in this case as Parisi in the *O'Brien* case and, accordingly, respectfully requests this Court to reconsider its denial of Robert's Motion to Remand in view of *O'Brien v. United States, supra.*

Respectfully submitted,

Thomas F. Call
Attorney for Appellant
Robert B. Roberts

Dated: May 9, 1967.

APPENDIX "E."

In the United States Court of Appeals, for the Fifth Circuit.

Norman Gradsky, George Levine, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glasser and E. E. Gibbons, Appellants, versus United States of America, Appellee. No. 19974.

Appeal from the United States District Court for the Southern District of Florida.

Before Coleman and Dyer, Circuit Judges, and Estes, District Judge.

By the Court:

It Is Ordered that the motion of appellant, Robert B. Roberts, for reconsideration of the denial of his motion to remand in this cause be and the same is hereby Denied.

(Original Filed—May 25, 1967)

APPENDIX "B."

In the United States Court of Appeals, for the Fifth Circuit.

Norman Gradsky, George Levine, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glaser and E. E. Gibbons, Appellants, versus United States of America, Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(May 2, 1967.)

Before Coleman and Dyer, Circuit Judges, and Estes, District Judge.

Dyer, Circuit Judge: Appellants were tried and convicted by a jury in the District Court for violating the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C.A. §77q(a), the Mail Fraud Statute, 18 U.S.C.A. §1341, and for conspiring to violate those laws, 18 U.S.C.A. §371.

The indictment charged the appellants with a fraudulent scheme to offer and sell promissory notes of Credit Finance Corporation to the public by use of the mails, and then divert the investors' funds to the appellants' personal use. Numerous false and misleading statements by the appellants induced people to purchase the notes. Count one of the indictment alleges in detail the fraudulent scheme. Each of the succeeding eight substantive counts alleges a separate employment of the scheme on a different investor by use of the mails. Count ten alleges a conspiracy to do the acts charged in Counts one through nine.

The jury found each appellant guilty on all ten counts. This court in *Gradsky v. United States*, 5 Cir., 1965,

342 F.2d 147, reversed sub nom. *Levine v. United States*, 1966, 383 U.S. 265, 86 S.Ct. 295, 15 L.Ed.2d 737, affirmed the convictions of Norman Gradsky, B. J. Gradsky, Gertrude Hogue, Robert Grene, George Levine and Leonard L. Glaser. It affirmed the conviction of Robert B. Roberts as to Counts 3, 6, 8 and 10 and reversed as to the remaining Counts 1, 2, 4, 5, 7 and 9; it affirmed the conviction of Alfred Schiff as to Counts 2, 8, 9 and 10 and reversed as to the remaining Counts 1, 3, 4, 5, 6 and 7; and it affirmed the conviction of E. E. Gibbons as to Counts 6 and 10 and reversed as to the remaining Counts 1, 2, 3, 4, 5, 7, 8 and 9.

Appellants Levine, Roberts, Grene, Norman Gradsky and B. J. Gradsky petitioned the Supreme Court for and were granted writs of certiorari, and as to them this court's mandate was stayed. Appellants Gibbons, Hogue, Schiff and Glasser did not petition for certiorari, and this court's mandate issued as to them on April 22, 1965, so they are now serving their sentences. Before reaching the merits, therefore, we must decide whether the appellants as to whom the mandate has already issued may be heard in this remand proceeding.

Usually the issuance of a mandate by this court means that the litigation has come to an end. *Hines v. Royal Indemnity Co.*, 6 Cir., 1958, 253 F.2d 111. This court can, however, recall its mandate to prevent injustice.[1] Rules of the Fifth Circuit Court of Appeals,

[1] Gertrude Hogue has moved to intervene in participating in this proceeding.

We are recalling the mandate with respect to appellant Roberts since he has petitioned the Supreme Court for certiorari.

Rule 32; *Meredith v. Fair*, 5 Cir., 1962, 306 F.2d 374; 28 U.S.C.A. §452. In view of the unusual circumstances of this case, the government's expression of non-opposition, and our desire to avoid further protracted litigation by appellants not presently participating in this remand proceeding, we recall our mandate as to appellants Gibbons, Schiff and Glaser and allow them to join in this proceeding.

The Supreme Court granted the petitions for writs of certiorari "* * * limited to the issue whether petitioners were improperly convicted of substantive offenses committed by members of the conspiracy before petitioners had joined the conspiracy or after they had withdrawn from it." The petitions were denied in all other respects. *Levine v. United States*, 383 U.S. at 266. In disposing of the case the Supreme Court said:

> "In response to specific questions addressed by this Court, the Solicitor General has made a two-pronged concession: First, he concedes that an individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy; and second, he concedes that in this case some of the convictions for the substantive offenses must be reversed because they are inconsistent with this principle.[1] On the basis of this concession, and upon consideration of the entire record, we vacate the judgment of the Court of Appeals insofar as it affirms petitioners' convictions for the substantive offenses. We remand the case to that court with instructions to reverse the convictions the Solicitor General concedes must be reversed, and to

determine, in light of the concession, the evidence, the instructions to the jury, and the applicable principles of law, whether in addition to the relief conceded by the Solicitor General petitioners are entitled to further relief regarding the convictions for the substantive offenses." Id. at 266-67. [Footnote omitted]

The Solicitor General conceded that appellant Levine's convictions on Counts 1, 3, 4, 5, 6, 7 and 8, and appellant Grene's convictions on Counts 1 and 7 must be reversed; therefore, this court on remand reversed the convictions on the stated counts and vacated the sentences; denied a motion by the Gradskys to remand to the District Court; and directed all of the appellants to file motions urging such further consideration as they might deem appropriate.

Notwithstanding the limited issue upon which the writs of certiorari were granted and thus our narrow scope of review on this remand, the appellants seek a re-review of alleged errors presented to and decided by us on the appeal[1] and attempt to assert now for the first time other errors, none of which are within the purview of the mandate of the Supreme Court. Except that which we are mandated to review, our previous

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[1] The following were submitted and considered on the appeal [illegible] in this proceeding: The appellants' contention that the district court erred in refusing to instruct on the essential elements of conspiracy and of the substantive offenses, the lack of evidence to sustain a conviction on direct [illegible], and the failure to instruct on aiding and abetting or [illegible] by an employee as a [illegible] necessary, failure to instruct on [illegible] and responsible doubt; failure to grant a continu- [illegible] that the verdict was against the weight [illegible]

rulings are the law of the case and will not now be reconsidered. *United Industrial Workers v. Galveston Wharves, et al.*, 5 Cir., 1966, 368 F.2d 412. We thus direct our attention to whether, in light of the Solicitor General's concession as to applicable legal principles, the members of the conspiracy "are entitled to further relief regarding the convictions for the substantive offenses."

In determining whether the evidence is sufficient to sustain a conviction on the substantive offenses we must view the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the government. *Glasser v. U.S.*, 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; *Ring, et al. v. U.S.*, 5 Cir., 1967, . . . F.2d . . . (Number 23602, March 24, 1967). A party to a conspiracy is liable as a principal for all offenses committed in furtherance of the conspiracy while he is a member of it. *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489, but a latecomer cannot be convicted as a principal for substantive offenses which were committed in furtherance of the conspiracy before he joined it or after he withdrew from it. *Levine v. United States, supra.* In this case, with the exception of Schiff's conviction on Count 8, each appellant stands convicted of only those substantive offenses committed in furtherance of the conspiracy while he was a member of the conspiracy. There is thus no error.

In Count 8 the mailing is alleged to have taken place on or about January 21, 1960, some seven or eight months prior to the time appellant Schiff joined the conspiracy. The government concedes that Schiff's conviction on this count must be reversed.

Appellants also argue that as a result of the failure of the District Court's instructions to distinguish the substantive counts from the conspiracy counts some of the defendants were convicted of substantive offenses committed in furtherance of the conspiracy before they joined the conspiracy. We need not determine the validity of this contention for the Solicitor General has conceded that convictions of such offenses should be reversed.

Appellants also urged that the District Court should have charged that to find an appellant guilty of a substantive offense in which he did not directly participate, the jury must determine that the substantive offense was committed in furtherance of the conspiracy of which he was a member. We doubt that this contention is properly before us on remand but we note that no appellant either requested this instruction or objected to the failure of the court to give it, although the court heeded most of the objections made to its charges. Generally, the failure to object will prevent a party from presenting that error on appeal. *Evans v. United States*, 5 Cir., 1965, 349 F.2d 653; *Alvarez v. United States*, 5 Cir., 1960, 275 F.2d 299. In any event, the purpose of such an instruction is to preclude the possibility of convicting a defendant for a substantive offense committed by other members of the conspiracy of which the defendant is a member in furtherance of a conspiracy of which the defendant is not a member.

The instruction thus was unnecessary here for there was evidence of only one conspiracy.

Appellant Grene contends that the District Court abused its discretion in denying his motion for a continuance because, although his court appointed counsel

was competent, he had insufficient time to prepare for trial and thus Grene did not have effective assistance of counsel. Grene raised this point on the appeal, argued it in his main brief and in his petition for rehearing following the affirmance of his conviction. We decline to again consider this question, because it has been previously decided and is not within the scope of the remand to this court by the Supreme Court.

We conclude that in the light of the concession made by the Solicitor General, the evidence, the instructions to the jury, and the applicable principles of law, except as to the conviction of appellant Schiff for the offense charged in Count 8, the appellants were not improperly convicted of substantive offenses committed by members of the conspiracy before appellants had joined the conspiracy or after they had withdrawn from it.

After oral argument was heard by this court on remand from the Supreme Court, the appellee filed a motion to vacate the judgment as to appellant Levine and remand the cause as to him to the District Court for a new trial. It appears from the motion that the Federal Bureau of Investigation installed a microphone by trespass in a commercial establishment in which Levine may have had a proprietary interest and the Federal Bureau of Investigation overheard conversations of Levine with counsel relating to the charges. Levine was under indictment in this case and the trial on the indictment took place during the period of surveillance. The motion must, of course, be granted. *Black v. United States*, 385 U.S. 26, 1966 . . . . S. Ct. . . ., . . . L.Ed.2d. . . .

The judgment against Norman Gradsky is affirmed as to the sentences imposed on all counts.

The judgment against B. J. Gradsky is affirmed as to the sentences imposed on all counts.

The judgment against George Levine is vacated and the cause as to him is remanded to the District Court for a new trial.

The judgment against Robert B. Roberts is affirmed as to the sentence imposed on Counts 3, 6 and 8.

The judgment against Alfred Schiff is affirmed as to the sentences imposed on Counts 2 and 9 and the judgment and sentence on Count 8 are set aside and vacated.

The judgment against Robert Grene is affirmed as to the sentences imposed on Counts 2, 3, 4, 5, 6, 8 and 9.

The judgment against Leonard L. Glaser is affirmed as to the sentences imposed on all counts.

The judgment against E. E. Gibbons is affirmed as to the sentence imposed on Count 6.

The judgments and sentences on Count 10 against all of the appellants were affirmed on the appeal, certiorari was denied, and that count is not before this court on remand.

The case is remanded for further proceedings not inconsistent with this opinion and judgment.

Affirmed in part and Reversed in part.

APPENDIX "G."

United States Court of Appeals, Fifth Circuit.

Norman Gradsky, George Levine, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glaser and E. E. Gibbons, Appellants, vs. United States of America, Appellee. 19,974.

Filed: June 5, 1967.

Appeal from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING

(June 5, 1967)

Before Coleman and Dyer, Circuit Judges, and Estes, District Judge.

PER CURIAM:

It Is Ordered that the petition for rehearing of appellant Robert B. Roberts in the above entitled and numbered cause be, and the same is hereby DENIED.

APPENDIX "H."

STATUTES INVOLVED

15 U.S.C. 77q(a). Fraudulent interstate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser.

18 U.S.C. 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the

maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139 § 34, 63 Stat. 94.